No. 3939.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Charles E. Wells,
Appellant,

vs.

Patrick H. Bodkin and Arabella Bodkin,
Appellees.

BRIEF FOR APPELLEES.

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STATEMENT OF THE CASE.

We see no purpose to be served by a lengthy restatement in our brief of the allegations which are concisely set forth in the pleadings, nor do we see any necessity for such a statement of the proofs to be found in the record as is set forth in appellant's brief. Such statements of facts could only tend to raise an issue of fact and there could be no purpose in attempting to raise an issue of fact on this appeal unless done in the hope

of clouding and befogging the real issue, which is purely one of law.

The action was brought by the appellant against the appellees to procure a decree in equity declaring that the appellees held a title to a certain quarter section of land in trust for the appellant, requiring the appellees to convey title to the appellant, and for the value of the use of the land for the period set forth in the complaint. The prayer of the complaint is based on allegations to the effect that the appellant was wrongfully, through mistake of law, deprived of such title or the acquiring of such title and that the appellees were wrongfully and by mistake of law granted such title by the Land Department of the United States. There is no claim of fraud, either actual or constructive. As was said in Quinby v. Conlan, 104 U. S. 420 (26 L. Ed. 800):

> "It would lead to endless litigation and be fruitful of evil if a supervisory power were vested in the courts over the actions of the numerous officers of the Land Department on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which upon a correct construction would have been conceded to them, or when misrepresentations and fraud have been practiced necessarily affecting their judgment, that the courts can in a proper proceeding interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled."

To the same effect, the cases of

Gage v. Gunther, 136 Cal. 338;
McLaren v. Fleischer, 181 Cal. 607.

This last case was affirmed by the Supreme Court of the United States, reported in 256 U. S., at page 477.

However, we have no quarrel with counsel for appellant concerning his summary of the allegations of the complaint and the denials contained in the answer, though we cannot subscribe and concede that the proofs in the record show exactly what plaintiff would have the court believe are all of the facts.

But, as stated above, it is not necessary to go into the facts of this case as the only question for determination by the court on this appeal is one of law.

Reference to Assignment of Errors.

Appellant sets forth fourteen specific assignments of errors, found in the record, pages 114 to 116, inclusive. These are summarized and condensed in appellant's brief under five specifications of error, pages 16 and 17 of appellant's brief. We will refer to them as specified and numbered in appellant's opening brief.

Response to First Specification of Error.

Appellant's first contention is that the decree appealed from is erroneous in that it decides that the officers of the Land Department did not make a mistake of law in holding that a preference right of entry became vested in Florence V. Bodkin, who was the predecessor in interest of the appellees, as the result

of the successful termination of her contest of the Geiger entry following his relinquishment, while the land embraced in his entry was withdrawn from all forms of disposal under the Reclamation Act, and in holding that a preference right could be so lawfully acquired by reason of the successful contest of an entry of land so withdrawn.

It will be observed that the Geiger entry referred to was made on May 18, 1903, at which time the land embraced in the entry was not withdrawn under a first form withdrawal, said entry being made subject only to a second form withdrawal, which withdrawal had been made on July 17, 1902. The first form withdrawal was not made until after the Geiger entry had been allowed, to-wit, on September 12, 1903. It is conceded by all parties that the Geiger homestead application was allowed and he was granted an entry upon the land involved in this suit. It is also conceded by all parties that on January 30, 1908, Florence V. Bodkin filed a contest affidavit against the Geiger entry and that on March 13, 1908, contestant filed for record a relinquishment of the Geiger entry duly executed by the said Geiger and that the contestant paid the cancellation fee of $1 and was notified that she was given a preference right of entry to be exercised within thirty days after the land was open for entry. [Record pp. 41-43.]

The situation is so similar to the case presented as set forth in the decision of the Supreme Court of the United States in McLaren v. Fleischer, 256 U. S. 477, at pages 478 and 479, that a substitution of the name

of Geiger in the place of Rider, and the name of Florence V. Bodkin in the place of Fleischer would make the situation practically identical.

As stated in that decision, concerning the right of the Rider entry, we can state in this case concerning the Geiger entry that while the withdrawal was in force one Bodkin instituted a contest against Geiger's entry and at her own cost procured its cancellation. Geiger acquiesced in that decision and is not concerned in the present controversy. Bodkin had no claim to the land prior to the contest and in instituting and carrying it through acted as a common informer, which was admissible under the public land laws. To encourage the elimination of unlawful entries by such contests, Congress had declared in the Act of May 14, 188, c. 89, 21 Stat. 40:

> "In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any pre-emption, homestead or timber culture entry, he shall be notified by the register of the land-office where such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to entry said lands."

When Geiger's entry was cancelled the register sent to Bodkin a written notice informing her thereof and stating that she would be allowed thirty days after the tract was restored to public entry within which to enter it in the exercise of her preferred right as a successful contestant. [Record p. 43.] The notice was dated July 1, 1908. Afterward the Secretary of the Interior issued an order whereby the lands included

in the withdrawal were restored to settlement under date of April 18, 1910, and to public entry on May 18th following. On the earlier date one Wells (the appellant herein) claims to have made homestead settlement on the tract here involved, and on the latter date, to-wit, May 18, 1910, said Florence V. Bodkin filed her homestead application and paid the fees therefor under her claim of preference right and on June 1, 1912, her entry was allowed; and on May 18, 1910, the same date that Bodkin filed her application, appellant filed his homestead application to enter the land in question by virtue of his alleged settlement; and on June 3, 1912, appellant was notified in writing that his application was rejected because of the homestead application of Florence V. Bodkin on the same lands filed May 18, 1910, under her preference right in the case of Bodkin v. Geiger. [Record p. 45 and p. 48.] Bodkin's application was allowed and Wells' rejected, the local officers being of the opinion that Bodkin had the prior and better right; that appellant duly appealed to the Commissioner of the General Land-office from such rejection and on November 15, 1912, the Commissioner affirms the rejection, holding that Florence V. Bodkin had acquired a preference right to enter said lands by virtue of the successful termination of her contest of the Geiger entry and that her application was in all respects regular and in the exercise of such preference right. [Record pp. 39-52.] Appellant appealed to the Secretary of the Interior, and on such appeal, it having become known to the Department that Florence V. Bodkin had died on March 25, 1912, the Secretary

cancelled the Bodkin entry and ordered the allowance of the Wells application in the event that he make proper showing of present qualifications to make homestead entry for the tract, making such decision on the proposition that the application of Florence V. Bodkin to make homestead entry did not descend to her heirs and that there was no authority of law for the allowance of entry in such case. [Record pp. 52-53.] Thereafter, appellees, as heirs of Florence V. Bodkin, made a motion for rehearing of the last mentioned decision of the Secretary, and on August 29, 1913, the Secretary denied such motion for the reason that it was made to appear that Bodkin, appellee, one of the heirs of the deceased Bodkin, had made other homestead entry in his own right, and in such decision directed that the entry of Florence V. Bodkin be cancelled and that the application of Wells should be allowed. Appellees thereafter petitioned the Secretary of the Interior for the exercise of his supervisory authority and on January 3, 1914, the Secretary decided that the filing of the application of Florence V. Bodkin under her preference right determined her heirs' rights in the premises so far as the form of entry under such preference right is concerned, and that no substitution for her homestead application of some other form of entry or purchase after the thirty days period could have been made by her or by her heirs so as to preserve such preference right and to extend the same beyond thirty days, but the appellees as heirs at law were held to have the right to perfect the deceased daughter's application by making entry

on the land, notwithstanding homestead entry that had been made by her father, one of said heirs; the Secretary holding that the fact of the father having made such homestead entry in his own right did not preclude his election to make and perfect homestead entry as co-heir with his wife, based on the application of his daughter, notwithstanding Wells' appearance in the case. In such decision, appellee Bodkin was allowed thirty days to elect whether he would relinquish his present homestead entry and make with his wife as co-heir homestead entry of the lands herein involved based on his daughter's application. [Record pp. 60-63.]

On January 26, 1914, appellee Bodkin was given notice in writing of the decision of the Secretary [Record pp. 64-65], and he thereafter on March 6, 1914. relinquished his homestead entry on other lands, and as one of the heirs, and for the heirs of Florence V. Bodkin, deceased, filed his application for homestead entry on the land in question, which was allowed on March 6, 1914, and attached thereto his affidavit stating that he made such application pursuant to the decision of the Land Department and as heir of said Florence V. Bodkin, and based on her application filed May 18, 1910 [Record pp. 67-70], and thereafter on May 2, 1914, the Commissioner of the Land-office cancelled the former homestead entry of Bodkin, appellee, on his relinquishment of March 6, 1914, and also cancelled the entry of appellant Wells.

In due course appellees received a patent for the land and appellant then brought this suit to have

appellees declared trustees for him of the title and to compel a conveyance in execution of the trust.

We submit that the foregoing statement is so nearly identical with the situation in McLaren v. Fleischer above stated that we need no further authority to support appellees' contention that the officers of the Land Department did not make a mistake in the law in holding that the preference right of entry became vested in Florence V. Bodkin as a result of the successful termination of her contest of the Geiger entry and in holding that a preference right could be so lawfully acquired as a result of a successful contest of an entry on lands so withdrawn. The language of the Supreme Court of the United States pertinent to this point is found in the decision of the McLaren Case, 256 U. S., at page 480, as follows:

> "In the practical administration of the act, the officers of the Land Department have adopted and given effect to the latter view. They adopted it before the present controversy arose, or was thought of, and except for a departure, soon reconsidered and corrected, they have adhered to and followed it ever since. *Many outstanding titles are based upon it and much can be said in suport of it.* If not the only reasonable construction of the act it is at least an admissible one. It therefore comes within the rule that the practical construction given to the Act of Congress is rarely susceptible of different construction by this authority, that the duty of exercising it is entitled to great respect and if acted upon for a number of years will not be disturbed except for cogent reasons."

The Supreme Court there cites the following decisions:

Brown v. U. S., 113 U. S. 258, 571;
Webster v. Luther, 163 U. S. 331, 342;
U. S. v. Hammers, 221 U. S. 220, 228;
Logan v. Davis, 233 U. S. 613, 627;
La Roque v. U. S., 239 U. S. 62, 64.

Response to Second Specification of Error.

Appellant's second specification of error is that the decree is erroneous in that it decides that the officers of the Land Department did not make a mistake of law in holding that the appellees herein, as heirs at law of Florence V. Bodkin, succeeded to and inherited the right of their deceased daughter to consummate her entry as evidenced and determined by her application of May 18, 1910, and in holding that such preference right was not terminated or exhausted by her application, but survived and descended to her heirs.

We submit that the decree is not erroneous in any of the respects mentioned in said specification.

The Supreme Court in the case of McLaren v. Fleischer having decided that under the provisions of the Act of Congress of May 14, 1880, the preference rights in question were valid, it necessarily follows that such right as was earned by Florence V. Bodkin by her contest against the Geiger entry descended to her father and mother under the Act of Congress of June 26, 1892. This act is an inheritance law and is intended to cast the preference right on the heirs undi-

minished and unimpaired by reason of any benefit ever taken by the heirs.

Biggs v. Fisher, 33 L. D. 465, was a case in which the homestead entry had been made by the defendant as heir of a successful contestant. This entry by the heir was contested on two charges, to-wit: (a) That the heir had theretofore, and in his own right, made and perfected a homestead entry; (b) that at the time of making entry as heir as was the owner of 160 acres. The said charges were admitted by the defendant. In dismissing the contest and sustaining the heir's entry the Department said:

> "The Act of May 14, 1880 (21 Stat. 140), provided, in substance, that one who had successfully contested an entry should be entitled, for a period of thirty days after notice of the cancellation thereof, to a preference right to enter the land. In construing this act the Department held that all rights, present as well as prospective, that might have been acquired by a contestant by virtue of his contest, were purely personal, and that upon the death of a contestant pending final action on his contest, the proceeding, so far as he was concerned, abated, thus determining his rights thereunder. This ruling, while clearly correct, operated harshly upon the heirs of deceased contestants, many of whom had spent large amounts of money in the prosecution of their respective contests with a view to entering the land, and, when final decision was about to be rendered in their favor, died without having had an opportunity to reap the benefits of their endeavors.

> Their estates were therefore despoiled of the money that they had so expended. It was this evil that was sought to be remedied by the Act of July 26, 1892, the purpose of said act being to provide a means whereby the citizen heirs of a deceased contestant might derive the same benefits from a contest commenced by their ancestor in his lifetime that such ancestor himself might have been entitled to had he lived. In the effectuation of this purpose *it was the intention of Congress, as clearly appears from the language used in the act and from the proceedings had in Congress with reference thereto, to place the heirs in the same position upon the successful termination of the contest that the contestant himself would have occupied if the contest had so terminated in his lifetime.* THE ONLY QUALIFICATION REQUIRED OF THE HEIRS BEING, AS EXPRESSLY STATED IN THE ACT, THAT THEY BE CITIZENS OF THE UNITED STATES. The Department therefore holds that upon the successful termination of a contest commenced by a person or persons who seek to exercise the preference right resulting therefrom show merely that they are the heirs of the deceased contestant and citizens of the United States, and that the contestant was a qualified entryman at the time of his death."

Biggs v. Fisher, quoted above, is sufficient authority for the proposition that the Act of July 26, 1892, was intended to cast the right upon the heirs undiminished and unimpaired by reason of any entry or filing theretofore made by the heirs or any of them.

Said act provided that the acts of heirs as such, or of persons in their representative capacity as heirs, shall be wholly unaffected by what their status toward the public land laws may be.

Response to Third Specification of Error.

In response to appellant's specification of error number 3, we submit that the decree is not erroneous in deciding that the officers of the Land Department did not make a mistake of law in holding that the appellees, as heirs at law of Florence V. Bodkin, were competent to inherit her preference right of entry, even after she had exercised her right by filing application based thereon, notwithstanding that at the time of her death and at the time of this contest the appellee Bodkin was holding a homestead in his own right.

Said Act of July 26, 1892, provided that the rights of heirs as such, or persons in their representative capacity as heirs, shall be wholly unaffected by what their status toward the public land laws may be in their personal or individual capacities.

> "The purpose of the Act of July 26, 1892, was to provide a means whereby the heirs of a deceased contestant might derive the same benefits from a contest commenced by his ancestor in his lifetime that such ancestor himself might have been entitled to had he lived."
>
> Heirs of Robert M. Averett, 40 L. D. 608.

It appears from the statement of facts in the case of Hagman v. Klammer, 36 L. D. 168, that the successful contestant was alive at the time of cancellation of the

entry but died before notice of preference right reached him. We refer to Hagman v. Klammer for the reason that the decision therein was to the effect that if the successful contestant had been either a citizen or a person who had declared an intention to become a citizen, his heir would have acquired a preference right of entry by inheritance *despite the fact that the heir had absolutely nothing whatever to do with the prosecution of the contest and that it was after cancellation of the contested entry and, therefore, after the preference right had accrued and vested that the contestant died.*

While the point here involved is contained in appellant's specification of error number 3 on page 17 of his brief, the point is argued as "second point" on page 32, and we submit that counsel answers his own argument when he quotes the language of the section as follows:

> "Said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred."

In other words, instead of the rights of Florence Bodkin lapsing when she exercised her preference right and filed upon the land involved, her interest in the land at that time attached, and it was that interest which was subsequently inherited by the heirs. The appellee Bodkin was not required to do anything until the rendition of the decision of the Secretary of the Interior requiring him to elect which parcel of land he would take.

Where a valid application has been made and the applicant dies before entry is allowed, even the right of entry descends to the applicant's heirs the same as if entry had been actually made.

Townsend v. Spellman, 2 L. D. 77;
Sturm v. R. R., 2 L. D. 546;
Sharrar v. Teachman, 5 L. D. 422.

And even where no application has been made owing to the fact that the land is unsurveyed, a settler may make a valid devise of his right of entry.

Tobias Beckner, 6 L. D. 136.

The law goes even further than this; in such cases the heir or devisee acquires the right of the decedent as one additional to those already possessed; thus entry may be made on the strength of an ancestor's application, though the heir has another entry which exhausts his right.

Dungan v. Griffin, 1 C. L. L. 254.

Response to Fourth Specification of Error.

In response to appellant's specification of error number 4, to the effect that the decree appealed from is erroneous in that it decides that the officers of the Land Department did not make a mistake of law in cancelling appellant's entry which had been allowed on October 14, 1913, and allowing the appellees' entry made on March 6, 1914, as heirs of Florence V. Bodkin, *without notice, hearing or evidence,* we must reply that the words, "without notice, hearing or evidence"

are not justified by the record. The cancellation of the entry erroneously allowed appellant was made after the exercise of supervisory authority by the Secretary of the Interior. Appellees filed two petitions with the Secretary of the Interior for exercise of that officer's supervisory authority, which petitions were filed September 29, 1913, and October 27, 1913, respectively, after a service of copies thereof on appellant by registered mail, and appellant made two answers thereto, one of such answers being filed October 27, 1913, and the other being filed December 8, 1913.

The matter of determining the rights of the parties was properly before the Department, and Bodkin's rights had not been abrogated, suspended or cancelled. Appellees had earned the right to a homestead, but of course had no right to two homesteads. The decision was rendered in the regular course of departmental business and there was no undue delay. The fact that nearly two years was consumed in arriving at the decision does not result in the loss by the Bodkins of the fruits of their *bona fide* efforts in complying with the homestead law. Inasmuch as they could not claim both homesteads, we do not see how the Department could in equity direct them to take either the one they had earned or the one they had inherited from Florence V. Bodkin, their daughter. This is neither a violation of the letter or the spirit of the law.

Supervisory power may be exercised on the Secretary's own motion and in the absence of appeal.

Knight v. Land Assn., 142 U. S. 178.

Such power is properly exercised to prevent substantial injustice.

Dickson v. Schlater, 2 L. D. 597.

The exercise of such power extends to a waiver of all irregularities in the proceedings, and consideration of the case on its merits.

C. W. Filkins, 5 L. D. 49.

To order a hearing out of time.

Alice Placer, 4 L. D. 314;
Sweeney v. Wilson, 10 L. D. 157;
Devereaux v. Hunter, 11 L. D. 214;
Tam v. Story, 16 L. D. 282.

Or to reopen a case that has been closed by failure to appear.

Pike's Peak Lode, 14 L. D. 47;
Purcell v. R. R., 14 L. D. 574.

And to dispense with the requirements of the rules of practice.

Yturbide v. U. S., 22 How. 290;
Poultney v. La Fayette, 12 Peters 472.

Response to Fifth Specification of Error.

Appellant's fifth specification of error as set forth in his brief is that the decree appealed from is erroneous in that it decides that the officers of the Land Department did not make a mistake of law in holding that the regulations of January 19, 1909, did not terminate any right that may theretofore have come to Florence

V. Bodkin by reason of the contest of the Geiger entry and its relinquishment and cancellation. In his argument he touches upon this specification under his "third point" on page 35 of his brief and cites as authority for such proposition the case of Edwards v. Bodkin, 249 Fed. 562. In the decision of the Supreme Court of the state of California in the case of McLaren v. Fleischer, 181 Cal., at page 615 (which decision was affirmed by the Supreme Court of the United States), we find this language:

> "Appellant relies upon Edwards v. Bodkin, 249 Fed. 562, in support of his claim that the preference right was awarded to the respondent through a mistake of law. The decision there was not to the effect that the contestant was by mistake of law given the preference right. It was there held that the Commissioner of the General Land Office had mistaken the law in declaring that the settler had abandoned his homestead claim. In discussing the question the court remarked that the Reclamation Act did not confer authority upon the Secretary of the Interior to so extend the limitation of the Act of May 14, 1888."

And in the opinion of the Supreme Court of the United States affirming the decision from which the last quotation was taken, we find on page 482, Vol. 256 U. S. Rep., in speaking of the Edwards case, this language:

> "Besides the defendant there was not claiming under an entry based on a preferred right, but under entries made after he had relinquished the entry which he claimed was based thereon; thus

the observations of the Circuit Court of Appeals respecting preferred rights were *obiter dicta,* and as the decree of affirmance in this court was put on other grounds, those observations are neither authoritative nor persuasive.

"Here it is not questioned that the original or first entry—that of Rider—was lawfully cancelled."

(Neither is it questioned in the case at bar that the Geiger entry was lawfully cancelled.)

Continuing from the decision of the Supreme Court of the United States:

"McLaren recognized that that that entry had been lawfully eliminated when he sought to initiate the claim to the land."

(Wells recognized that the Geiger entry had been lawfully eliminated when he sought to initiate the claim to the land here involved.)

Quoting again from the decision of the Supreme Court of the United States:

"He should also have recognized that Fleischer by his contest had brought about this elimination and was entitled as a reward to enter the land any time within thirty days after it was restored to entry."

(Wells should also have recognized that Bodkin, by her contest, had brought about the elimination of the Geiger entry and was entitled as a reward to enter the land at any time within thirty days after it was restored to entry.)

Concerning the case of Edwards v. Bodkin, the same learned counsel in his brief upon the trial of this case in referring to the decision of the Supreme Court of the United States in McLaren v. Fleischer, had this to say:

"This disposes of the point raised in our former argument in this case that the preference right awarded to Florence Bodkin was null, and on that one question of law the decision of the Circuit Court of Appeals in the Edwards v. Bodkin case is overruled."

We are unable to follow counsel when he states in one brief that a decision is overruled and cites in his brief on appeal the overruled case.

But we do not contend that the decision in the case of Edwards v. Bodkin as rendered by this court was overruled. In fact, the decision was affirmed by the Supreme Court of the United States, but in commenting upon the decision the court distinguished the Edwards v. Bodkin case from the case of McLaren v. Fleischer and pointed out that the case of Edwards v. Bodkin was decided on entirely different grounds. The Edwards case was obviously a different case from the one at bar, because of the radical difference of the status of plaintiffs in the respective cases with relation to the land involved. Edwards had a valid homestead entry and the United States Circuit Court held that the land-office officials erred in holding that he had abandoned his entry. Edwards in that case occupied the same relation to the land that Geiger, the original entryman in this case, occupied to the land here in-

volved. Wells, the appellant herein, never occupied such relation to the land in question.

We submit, therefore, that there is no point in any of appellant's contentions or arguments.

Response to Appellant's Anticipated Defenses.

Appellant goes to considerable length in anticipating defenses of appellees, and had these not been mentioned in the opening brief, we would be inclined to disregard same, but since counsel for appellant invites it, we will again say that appellant was at all times that he occupied the lands involved in this suit, a trespasser.

He attempted at the trial to remove his disqualification by testifying that he settled in the county road adjoining this land, but not upon it. At the time he settled in the spring of 1908 there was no county road in that vicinity, and if there had been he would have been upon the land in question according to his testimony on cross-examination wherein he stated he camped about 20 or 30 feet south of the center line of what would have been the road. This obviously locates him upon the land when he first settled early in 1908 as the center line of the road as later laid out is the north line of this land, and the road was 60 feet wide. [Record pp. 100, 101, 102, 103.]

Therefore, when he first settled he was a trespasser upon the private claim of Jacob Geiger, whose entry was still intact and uncancelled.

The Geiger entry was contested by Florence V. Bodkin on January 30, 1908, but was not cancelled until

July 1, 1908. On September 12, 1903, the Commissioner of the General Land-office issued a first form withdrawal order under the Reclamation Act of July 17, 1902, by virtue of which order the land involved became withdrawn land as soon as the Geiger entry was cancelled, and from that date appellant was a trespasser upon withdrawn public lands until entry was allowed the appellees, and thereafter appellant was a trespasser upon appellees' rightful possessions until dispossessed by the judgment of the Superior Court of the state of California, in and for the county of Riverside, in an action of ejectment. It thus appears conclusively that appellant was at all times a trespasser.

By virtue of being thus a trespasser, appellant was disqualified to make entry when the lands involved were finally restored to entry May 18, 1910.

32 Cyc. 816;
Smith v. Townsend, 148 U. S. 490;
Payne v. Robertson, 169 U. S. 323.

Appellant's citation from 32 Cyc. 820 and note 74, are not in point. The language of said note is as follows:

> "Settlers who make valuable improvements on public lands *which have not been reserved for the exclusive use of the United States are not regarded as trespassers,* etc."

Note the italicized qualification which applied in this case. These lands after the cancellation of the Geiger entry were reserved for the exclusive use of the United

States under first form withdrawal. Appellant's claim of settlement as of April 18, 1910, is a subterfuge to avoid the disqualification he was under because of his actual settlement and premature occupancy of the land for two years in disregard of the rights of other private persons or the United States. Hence his application, affidavit and payment of fees for a homestead entry could avail him nothing. This principle is clearly enunciated by the Supreme Court of the United States in Payne v. Robinson, 169 U. S. 323.

Appellant unlawfully entered upon and occupied the land involved over six years, to-wit, from March, 1908, to September, 1914. He was there over four years after he claims to have made entry. Why did he not at lease offer to make final proof? He admits he did not, yet claims three years occupancy while a trespasser earned him the title. We submit that the appellant falls far short in his proof of his right to control the legal title as against appellee.

Plummer v. Brown, 70 Cal. 544;
Payne v. Elliott, 54 Cal. 339;
Kentfield v. Hayes, 57 Cal. 409;
Chapman v. Quinn, 56 Cal. 266;
Burell v. Haw, 48 Cal. 225;
Powers v. Leith, 53 Cal. 711;
Hosmer v. Duggan, 56 Cal. 257;
Amrecoechea v. Sinclair, 60 Cal. 532;
Atherton v. Fowler, 96 U. S. 513;
Hosmer v. Wallace, 97 U. S. 575.

With regard to the title acquired by adverse possession, we disagree with counsel for appellant that the United States is the predecessor of the appellant. In order that there may be a predecessor there must be a successor. Since the appellant is not the successor of the United States it follows that the United States is not the predecessor of the appellant. It is the appellees in this case who occupy the position of successor to the United States and the United States is the predecessor of the appellees and not of the appellant. The cases cited by appellant are relied upon by appellees in support of their contention that this case being in its final analysis one for the possession of real estate must have been commenced within five years after appellant was dispossessed. In Curtner v. U. S., 149 U. S. 676, which was one by the United States to correct a patent, the court held that the United States was barred by the statute of limitation because it had no interest in the land in question, and the parties in interest in litigating between themselves would have been barred by such statute. The language of the court in this respect was as follows:

> "Under the laws of California an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim, but no action can be brought for the recovery of real property or possession thereof, or arising out of the title thereof, unless such action is commenced within five years after the cause of action shall have accrued, but an action for relief

> not otherwise provided for must be commenced within four years. The California Code of Civil Procedure, sections 318, 319, 343 and 738. Whether the statute be applied directly, or by analogy, or the rule in equity founded upon lapse of time and staleness of claim the delay and laches here are fatal to the maintenance of suit."

The point decided in Bradley Brothers v. Bradley, 20 Cal. App. 1, was that an action such as this is an action to recover possession of real property and is governed by section 318 of the Code of Civil Procedure instead of section 343.

In Hillyer v. Hynes, 33 Cal. App. 506-510, the court says:

> "We think, however, that while the main ground of the action is constructive fraud and that one of its purposes is to enforce a trust, in its final proposition it is an action to recover the title and possession of real property and is therefore subject to the provisions of section 318 of the Code of Civil Procedure. Accordingly the five-year period prescribed by that section is the only limitation which can be applied in bar of plaintiff's cause of action." (Citing other California cases.)

To us this language means that from the time appellant was dispossessed, if he had any right at all, he had the right of action to recover possession until that right was lost by lapse of time.

Again, in the case cited by appellant, Truckee River G. E. Co. v. Anderson, 40 Cal. App. 526, at page 532:

> "Actual possession in hostility to the true owner works a deseizin and if a deseizor is suffered to remain continuously in possession after the statutory period the remedy of the former is extinguished."

Appellant's last proposition that he was under total disability to commence this action until the issuance of patent is correct if the action be treated solely as a suit to enforce a trust. He could not maintain an action to control the legal title so long as the title remained in the United States, but treating the action as he does, as an action to recover possession and damages, the authorities cited are against him, particularly Sproat v. Durland, 35 Pac. 682, which was a suit for injunction to prevent interference with the possession of a homestead claim. That is an Oklahoma case where they did not have our statute relative to unlawful detainer, and the courts held that action for ejectment would not lie, but in that case the rights of the parties to possession was determined prior to the issuance of patents in an injunction proceeding, just as the rights of the parties to possession in this case were determined by the Superior Court of Riverside county by the action in which appellant was dispossessed, as alleged in his complaint, by a judgment duly made and given in that court.

In every instance in which the courts have said that "the statute of limitations does not begin to run until after the patent has been issued," so far as we have been able to find, it has been a case where the person

in possession was asserting an adverse possession against the patentee. It is stated that legal title remains in the United States until patent issues, and that the statute will not run against the government, hence will not run against the patentee, but as against all the world except the government the statute does run.

Page v. Fowler, 28 Cal. 605;
Hayes v. Martin, 45 Cal. 559.

The language of the court in this last case is in part as follows:

> "It is not requisite that the party who relies upon the statute should show that he claims title in hostility to the United States; he may admit title in the United States either with or without a claim on his part of the right to acquire the title from the United States, and it is sufficient if he has such possession as is required by the statute and claims in hostility to the title which the plaintiff establishes in the action."

A party may invoke the statute of limitations in reference to rights over government lands.

Page v. Fowler, 28 Cal. 605;
McManus v. O'Sullivan, 48 Cal. 15;
Page v. Fowler, 37 Cal. 103;
Farish v. Coon, 40 Cal. 57;
Hayes v. Martin, 45 Cal. 559;
Lord v. Sawyer, 57 Cal. 65.

Since the statute of California has run against the appellant in this case, and the appellees hold the patent

as well, we submit that the cases cited by counsel in anticipation of this defense are inapplicable and that the cases here cited and hereinafter cited are more in point and controlling.

If appellant ever had any rights in the land, which we contend he did not, such right to recover possession by this or any other action is barred by sections 318, 319, 323 and 325 of the Code of Civil Procedure of the state of California.

To constitute adverse possession and set the statute of limitations to running, terminating in a bar, there must be present and proved five distinct elements. In this case these are admitted to have been alleged and proved. They are:

1. The possession must be actual, exclusive, open, notorious and not clandestine.
2. It must be hostile to the plaintiff's title.
3. It must be under a claim of title exclusive of any other right than one's own.
4. It must be continuous and uninterrupted for five years prior to the commencement of the action.
5. All taxes must have been paid by the occupant.

Unger v. Mooney, 63 Cal. 586.

When title by adverse possession has been thus acquired, it not only bars the remedy but it distinguishes the right of the holder to title.

Arrington v. Lescomb, 34 Cal. 365;
Cannon v. Stockmon, 36 Cal. 535;
San Francisco v. Fulde, 37 Cal. 349.

It is sufficient not only to bar a claim under a legal title, but also to create a title known as title by prescription.

Owsley v. Matson, 156 Cal. 401;
Wheatley v. San Pedro L. A. & S. L. R. R., 169 Cal. 505;
Cummings v. Laughlin, 163 Cal. 561;
LeRoy v. Rogers, 30 Cal. 229;
Arrington v. Lescomb, *supra;*
Cannon v. Stockmon, *supra.*

Conclusion.

We submit that before appellant can be permitted by a court of equity to control the legal title conveyed by patent from the United States Government to the appellees, he must establish a far different status in relation to the land involved than has been established in this cause. We maintain that he was a trespasser at all times that he was upon the land in question; that therefore his settlement was illegal and his subsequent residence availed him nothing; that the appellees inherited the valuable preference right acquired by their daughter, Florence V. Bodkin, by virtue of her contest against the Geiger entry, which was cancelled as a result of her contest; that the Secretary of the Interior did not mistake the law in recognizing this vested interest in the appellees and in issuing patent to them upon their homestead entry made at the direction of and in accordance with the requirements of the Secretary of the Interior.

We submit in conclusion that since the Supreme Court of the United States has held in affirming the Supreme Court of the state of California in the case of McLaren v. Fleischer that preference rights granted to contestants such as Florence V. Bodkin, predecessor of the appellees, were legally allowed, and since those rights were legally extended for a period of thirty days beyond the restoration to entry of the land involved as decided by the Supreme Court of the United States, and since there can be no question under the authorities herein cited that such right is inheritable, we can find no error in the decree appealed from and submit that the same should be affirmed.

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